

MAR 20 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JIMMY RODRIGUEZ, JR.,

Defendant - Appellant.

No. 05-10193

D.C. No. CR-04-01175-RRC/JCC

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Argued and Submitted March 13, 2006
San Francisco, California

Before: RYMER, W. FLETCHER, and CLIFTON, Circuit Judges.

Jimmy Rodriguez, Jr., who entered into a conditional plea agreement in which he pled guilty to Possession with Intent to Distribute Marijuana in excess of 100 kilograms, appeals the District Court's denial of his motion to suppress and his

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

sentence. We conclude that the motion to suppress was properly denied and that he is not eligible for safety valve relief pursuant to 18 U.S.C. § 3553(f).

Rodriguez's motion to suppress was properly denied because even assuming there had been an arrest, the agents had probable cause. "Probable cause exists when, under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime." *United States v. Buckner*, 179 F.3d 834, 837 (1999) (quoting *United States v. Garza*, 980 F.2d 546, 550 (9th Cir. 1992)) (alteration in original) (citation and quotation marks omitted). Several factors contributed to the agents concluding that there was a fair probability that Rodriguez was committing an offense: (1) the mismatched license plate; (2) the appearance of a false bed in the truck; (3) the observation that the truck had been altered such that an eight-to-ten-inch gap existed; (4) the odor of marijuana; and (5) the apparent inconsistencies with Rodriguez's claim that he had just come from laying tiles. *See, e.g., United States v. Leazar*, 460 F.2d 982, 984 (9th Cir. 1972) (holding that the smell of marijuana, together with other suspicious behavior, gave rise to probable cause). Given the totality of the circumstances, the agents had probable cause to arrest Rodriguez.

Even assuming that Rodriguez did not waive his right to appeal his sentence, he is not entitled to safety valve relief because he does not meet the necessary criteria under 18 U.S.C. § 3553(f). In order to be safety valve eligible, Rodriguez must have no more than one Criminal History Point prior to any application of a downward departure. *United States v. Valencia-Andrade*, 72 F.3d 770, 774 (9th Cir. 1995); U.S.S.G. § 5C1.2(a)(1). Here, Rodriguez properly received two Criminal History Points for his prior probation revocation related to a conviction for Driving Under the Influence. Thus, he is not eligible for the safety valve.

AFFIRMED.